92-1691

Supreme Court, U.S.
FILED
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

CONSOLIDATION COAL COMPANY, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and
UNITED MINE WORKERS OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the National Labor Relations Board has the jurisdiction and authority to direct Petitioner, Consolidation Coal Company, to provide information and documents to the United Mine Workers of America when the information and documents are arguably relevant only to the issues raised in a Federal Court action simultaneously being prosecuted by the United Mine Workers of America and are sought for purposes not included within the Union's statutory duties and responsibilities?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Third Circuit.

Consolidation Coal Company is a direct subsidiary of CONSOL, Inc. and Consol Energy, Inc. CONSOL, Inc. is wholly owned by Consol Energy, Inc. In turn, Consol Energy, Inc. is partially owned (50%) by DuPont Energy Company which, in turn, is a wholly owned subsidiary of E. I. duPont de Nemours & Company. The balance (50%) of the stock of Consol Energy, Inc. is owned by Rheinbraun A.G. and Rheinbraun U.S. GmbH, both of which are owned by RWE. Consolidation Coal Company has no subsidiaries that are not wholly owned subsidiaries.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

CONSOLIDATION COAL COMPANY, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and
UNITED MINE WORKERS OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Consolidation Coal Company, Petitioner herein, respectfully requests that a writ of certiorari issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on January 21, 1993.

OPINIONS BELOW

The unreported January 21, 1993 Judgment Order of the Court of Appeals for the Third Circuit sought to be reviewed is reprinted in the Appendix to this Petition, pp. 1a-4a. The Order of the National Labor Relations Board, entered April 14, 1992, is reported at 307 NLRB No. 13, 140 L.R.R.M. 1108 (1992), and is reprinted in the Appendix to this Petition, pp. 5a-12a. The Decision and Order of the Administrative Law Judge is reprinted in the Appendix to this Petition, pp. 13a-52a.

STATEMENT OF JURISDICTION

The Judgment Order of the Court of Appeals was entered on January 21, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1) and Rule 10.1(c) of the Supreme Court Rules.

STATUTE INVOLVED

This case involves Section 8(a)(5) of the National Labor Relations Act, as amended, 29 U.S.C. Section 158(a)(5), which provides as follows:

> (a) **Unfair labor practices by employer.** It shall be an unfair labor practice for an employer --
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [29 U.S.C.S. Section 159(a)].

STATEMENT OF THE CASE

This matter concerns an unfair labor practice charge filed on May 21, 1990 by the International Union, District 4 and Local Unions 6321 and 1980, United Mine Workers of America (hereinafter collectively referred to as the "UMWA"), against Petitioner, Consolidation Coal Company (hereinafter "Consol"), alleging a violation of Section 8(a)(5), 29 U.S.C. Section 158(a)(5), of the National Labor Relations Act (hereinafter "Act"). In the charge, the UMWA alleged that Consol violated the above referenced provision by refusing to provide certain information and documents requested in a letter dated April 18, 1990, which sought information and documents from and concerning Consol and several other specified companies, including Consol

Pennsylvania Coal Company, Enlow Fork Mining Company and DuPont Energy Co (hereinafter "CPCC", "EFMC" and "DEC," respectively).

On April 1 nd 20, 1990, separate grievances were filed by Locals 6321 and 1980 of the UMWA alleging violations of the National Bituminous Coal Wage Agreement of 1988 (hereinafter "1988 NBCWA") by Consol, CPCC, EFMC and DEC. Consol is a signatory to the 1988 NBCWA and the two Locals represent the classified employees of Consol at two of its facilities in Western Pennsylvania. The aforesaid grievances alleged that the 1988 NBCWA was violated when certain laid-off Consol employees were not offered panel rights at mines operated by CPCC and EFMC, entities which are not signatories to the 1988 NBCWA or any other labor agreement with the UMWA.

The pertinent provision of the 1988 NBCWA provides that "the first three out of every five new job openings for work of a nature covered by this Agreement at any existing, new, or newly acquired non-signatory bituminous coal operation of the Employer shall be filled by classified laid-off Employees on the panels of the Employer's operations covered by this Agreement." (Emphasis added.) While Article I of the 1988 NBCWA, entitled Enabling Clause, defines Employer as each coal operator which is a signatory to the Agreement, the requests for information and documents set forth in the UMWA's April 18, 1990 letter, and the grievances filed by Locals 6321 and 1980, related to all of the corporate entities identified above, of which only Consol is a signatory.

On June 6, 1990, the UMWA also filed

a Complaint in the United States District Court for the Western District of Pennsylvania, at Civil Action No. 90-0969 (hereinafter "Federal Court action"), seeking to compel CPCC and EFMC to jointly participate with Consol in the processing of the aforesaid grievances. The request for relief was based on the allegation that all three entities were alter egos or a single employer. Although Consol never refused to participate in the grievance proceedings, CPCC and EFMC, which are not signatories to the 1988 NBCWA, did not agree to participate.

Consol, CPCC, EFMC and the UMWA have engaged in extensive discovery in the Federal Court action, including the taking of numerous depositions, responding to extensive interrogatories, and producing voluminous documents. All

of the requests for information and documents contained in the UMWA's April 18, 1990 letter, which is the subject of the Board and the Circuit Court decisions in this case, have also been requested by the UMWA in the discovery processes in the Federal Court action.

While the Federal Court action was filed on June 6, 1990, the Complaint issued by the Regional Director for Region Six of the Board, in response to the UMWA's unfair labor practice charge, was not filed until July 17, 1990.

Thus, three separate but related proceedings initiated by the UMWA have been pending at the same time. One proceeding involves the resolution of still pending grievances filed by Local Union Nos. 6321 and 1980 alleging violations of the 1988 NBCWA. The second proceeding involves the Federal Court

action seeking to compel non-signatory entities (CPCC and EFMC) to participate with Consol in the grievance proceedings on the basis of the single employer and alter ego doctrines. The third proceeding is the Board action seeking to compel Consol and the non-signatory entities to produce information and documents requested by the UMWA in its April 18, 1990 letter directed to Consol.

Consol is herein asking this Court to review the Judgment Order of the Circuit Court enforcing the Board Order against Consol. However, the issue presented for review requires a discussion and consideration of all three separate but related proceedings described above.

REASONS FOR GRANTING THE WRIT

This Court has, in prior cases, decided issues involving the relationship of the courts to the arbitration process when an arbitration award is under review or when the employer's agreement to arbitrate is in question. See, e.g., United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); and Paperworkers v. Misco, Inc., 484 U.S. 29 (1987). This Court has also dealt with the relationship of the Board to the arbitration process. See, e.g., Carey v. Westinghouse Electric Corporation, 375 U.S. 261 (1964); and NLRB v. Acme Industrial, 385 U.S. 432 (1967). In addition, this Court has dealt with the issue as to when a state or federal court is pre-empted from entertaining a claim when the subject matter is within the exclusive

jurisdiction of the Board. See, e.g., San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959).

However, undersigned counsel for Consol are unaware of any case in which this Court has decided the important question of federal labor law raised in the instant action, i.e., the relationship between and the respective jurisdiction and authority of a Federal District Court and the Board in related proceedings involving requests for the same information and documents initiated by a union. Accordingly, Consol is respectfully requesting that this Court review this case on writ of certiorari under the considerations set forth in Rule 10.1(c) of the Supreme Court Rules.

Consol is certainly not unmindful of the well recognized principle that an employer's duty to bargain in good faith

under Section 8(a)(5) of the Act requires it to comply with a union's request for relevant information that is necessary for a union to fulfill its responsibilities as the employees' statutory representative, including information relevant to both contract administration and contract negotiations. In that regard, the Board, adopting the decision of the Administrative Law Judge ("ALJ") with some modification, stated as follows:

> The standard applied in determining relevancy in these circumstances requires that the information have some bearing on the issue for which the information is requested and be of probable or potential relevance to the Union's duties. Pfizer, Inc., 269 NLRB

916, 918 (1984). (35a).

As a result, the primary inquiry in this information case is to determine the issue with respect to which the information and documents requested by the UMWA in its April 18, 1990 letter relates or has "some bearing". Additionally, it is necessary to determine the nature and extent of the UMWA's statutory duties as the representative of its members.

It would appear that the Board and the Circuit Court determined that the information and documents requested by the UMWA were relevant to the issues raised in the pending grievances and that the processing of those grievances was a necessary part of the UMWA's statutory duties and responsibilities. For example, the Board, adopting the decision

of the ALJ with some modification, stated as follows:

> Here, in order to pursue [sic] its grievances filed under Article I, Ia and II of the contract [1988 NBCWA], the Union sought information to establish that Respondent [Consol], CPCC, Enlow Fork and any other subsidiary or affiliate operate as a joint or single employer with Respondent [Consol]. (39a).

It is conceded that the information and documents sought by the UMWA in its April 18, 1990 letter which was the subject of the Board proceeding (as well as the voluminous discovery undertaken by the Union in the Federal Court action) was for the purpose of trying to

establish an alter ego or single employer relationship among Consol, CPCC and EFMC. However, information and documents relating to those theories were not relevant to the issues raised in the pending grievances. To the contrary, Consol submits that the information and documents requested by the UMWA in its April 18, 1990 letter and in the Federal Court action have a "bearing", or an arguable potential relevance, if any, only in connection with the UMWA's prosecution of the Federal Court action in which the single employer and alter ego issues have been directly raised and will be resolved.

Thus, the important issue of federal labor law which Consol is asking this Court to consider and decide is whether the Board has the jurisdiction and authority to direct an employer, under

the guise of the employer's duty to bargain, to provide a union with information and documents which are relevant only to the issues raised in a federal court action asserted by a union against the employer (and others) and also whether the UMWA's statutory duties or responsibilities as the representative of its members includes the prosecution of lawsuits such as the Federal Court action filed by the UMWA against Consol, CPCC and EFMC.

In the Federal Court action, the UMWA has relied upon the single employer and alter ego theories in an effort to justify their request that the District Court order non-signatories such as CPCC and EFMC to participate along with Consol in the resolution of the pending grievances. However, inasmuch as arbitration is a matter of contract, it

is clear that no arbitrator has the authority or jurisdiction to determine whether non-signatories such as CPCC and EFMC should be required to submit to arbitration. Instead, that decision is only for a district court to make. Steelworkers v. Warrior & Gulf Co., supra, 363 U.S. at 582-83.

Thus, Consol is asking this Court to review and decide whether the Board should, in these circumstances, have abstained from or been prohibited from directing Consol to provide information and documents to the UMWA for a purpose which is not a part of the UMWA's statutory duties and responsibilities. Stated another way, Consol contends, and respectfully requests this Court to review and decide, the question as to whether the issue relating to the production of information and documents

relating solely to the UMWA's theories should have been left for resolution solely by the District Court in the Federal Court action where those theories have been directly raised and will be resolved.

In the Acme case, supra, which also involved a Board Order directing an employer to provide a union with information, the Supreme Court stated as follows:

> Thus, the assertion of jurisdiction by the Board in this case in no way threatens the power which the parties have given the arbitrator to make binding interpretations of the labor agreement.
>
> Far from intruding upon the preserve of the arbitrator, the Board's action was in aid

of the arbitral process.

385 U.S. at 438. In the instant case, the Board's action was not in aid of the arbitral process since the arbitrator does not have the authority or jurisdiction to decide whether non-signatory entities can be compelled to participate in an arbitration proceeding on the basis of the single employer or alter ego theories. Moreover, the assertion of jurisdiction by the Board in this case is not necessary to aid or assist the District Court, which has the full power and authority to resolve discovery issues in the Federal Court action. Instead, the Board's action in this case intrudes upon and threatens the jurisdiction and authority of the District Court in the Federal Court action to alone determine

the production of information and documents deemed relevant to the theories which the UMWA has chosen to present to the District Court for resolution in the Federal Court action.

Enforcement of a Board Order such as the one involved herein presents the potential, if not the actuality, for conflicts between the Board Order requiring wholesale production of information and documents and decisions of the District Court regarding discovery disputes posed in the Federal Court action. In the latter regard, Consol would represent to this Court that the District Court in the Federal Court action has rejected the UMWA's request for some of the same information and documents which are the subject of the Circuit Court's Judgment Order affirming the Board's Order in this case.

It is irreconcilable that a District Court, charged with resolving the specific issue with respect to which the information and documents have been requested, can find certain documents and information to be not subject to production and to have the Board and the Circuit Court direct Consol to produce that same information and documents to the UMWA. The relationship between the jurisdiction and powers of the District Court and the Board in such matters is an important issue of federal law which should be resolved by the Supreme Court.

In Smith v. Evening News Assn., 371 U.S. 195 (1962), this Court permitted an employee to file an action in a state court against his employer seeking damages for breach of a collective bargaining agreement, even though it was conceded that such conduct would

constitute an unfair labor practice prohibited by Section 8 of the Act. The Smith case is distinguishable in many respects from the instant case. However, in Smith, this Court stated as follows:

> If, as respondent strongly urges, there are situations in which serious problems will arise from both the courts and the Board having jurisdiction over acts which amount to an unfair labor practice, we shall face those cases when they arise.

Id. at 197-198. Although Consol does not concede that an unfair labor practice exists in this case, nevertheless it believes that this case presents a situation in which serious problems have arisen when both a District Court and the

Board have exercised jurisdiction with respect to the same matters.

Consol recognizes the fact that the Board applies a very liberal discovery standard in Section 8(a)(5) information request cases. However, every standard, no matter how liberal, must have some reasonable restrictions or limitations. One such limitation should be to require a union, General Counsel and the Board to strictly follow and apply the standard established by the Board itself in Pfizer, supra; i.e., the information requested must have "some bearing on the issue for which the information is requested and be of probable or potential relevance to the Union's duties." Pfizer, Inc., 269 NLRB 916, 918 (1984). That standard has not been satisfied in this case.

The Board has itself found that the

information and documents sought by the UMWA were for the purpose of trying to establish that CPCC and EFMC operated as a joint or single employer with Consol. It is undisputed that those are the theories upon which the UMWA is relying in the Federal Court action in an effort to compel CPCC and EFMC to participate with Consol in the pending grievances. Nor can it be disputed that an arbitrator does not have the authority to compel non-signatories to participate in grievance proceedings.

Thus, it is apparent that the information and documents requested by the UMWA have bearing only on the issue posed in the Federal Court action and Consol respectfully submits that prosecution of that action is not a part of the Union's statutory duties and responsibilities. The issue presented

for review therefore is whether or not the Board and the Circuit Court can require the production of information and documents under Section 8(a)(5) of the Act when that information and those documents would only be relevant in the Federal Court action and not the arbitration proceedings.

This intrusion into the jurisdiction of the District Court could be avoided if the Board and the District Court were not simultaneously ruling on the relevancy of information and documents which have a bearing, if any, only on the issues raised in the Federal Court action. The conflict presented when both a District Court and the Board have exercised jurisdiction with respect to the same discovery matters presents an important issue of federal labor law which should be resolved by this Court.

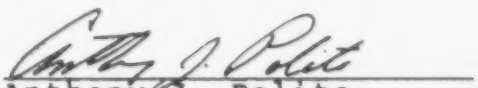
Both the Board and the UMWA have previously contended that the issue of federal labor law presented by Consol in this case, and which is being raised in this Petition, is governed by the provisions of Section 10(a) of the Act, 29 U.S.C. Section 160(a), which provides that the Board's power to remedy an unfair labor practice is not affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise. The issue which Consol is asking this Court to consider and decide however is whether an unfair labor practice has been committed in a situation, as here, where the information and documents requested by the UMWA under the provisions of Section 8(a)(5) of the Act are for purposes outside the scope of the UMWA's statutory duties and

obligations. If that question is answered in the negative, as Consol contends, then no unfair labor practice exists for the Board to remedy and Section 10(a) of the Act is inapplicable.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that its Petition for a Writ of Certiorari be granted.

POLITO & SMOCK, P.C.

By 
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Attorneys for
Consolidation Coal Company

Date: April 20, 1993

APPENDIX

A. JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

B. DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

C. DECISION AND ORDER OF ADMINISTRATIVE LAW JUDGE

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 92-3248 and 92-3290

CONSOLIDATION COAL COMPANY,
Petitioner in 92-3248

v.

NATIONAL LABOR RELATIONS BOARD,
Petitioner in 92-3290

and

UNITED MINE WORKERS OF AMERICA,
Intervenor

On Petition for Review and
Cross-Application for Enforcement
of an Order of the National Labor
Relations Board
No. 6-CA-22722

Submitted Under Third Circuit
Rule 12(6) January 12, 1993 Before:
HUTCHINSON, SCIRICA, and ROSENN,
Circuit Judges

JUDGMENT ORDER

These petitions came on to be heard on the record from the National Labor Relations Board and the briefs of the parties and were submitted under Third Circuit Rule 12(6) on January 12, 1993.

The International Union, District 4, and Local Unions 6321 and 1980, United Mine Workers of America (UMWA), filed an unfair labor practice charge alleging that Consolidation Coal Company (Consol) violated section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. Section 158(a)(5) in refusing to provide certain information and documents referred to in a letter of April 18, 1990, directed to Consol. The Regional Director of Region VI issued a complaint and notice of hearing alleging, inter alia, that Consol by failing to provide requested information was in violation of the foregoing section of the Act. After

hearing, the Administrative Law Judge found that Consol had violated the Act and the Board subsequently issued its decision and order affirming the rulings, findings, and conclusions of the ALJ and adopted his recommended order with certain modifications. Consol timely filed a petition with this court seeking review of the Board's decision and order (No. 92-3248). The Board filed with this court a cross-application for enforcement of its order (No. 92-3290), which was consolidated for hearing on appeal with Consol's petition for review.

After consideration of the contentions raised by petitioners in the petition for review and the cross-application, it is

ADJUDGED and ORDERED that the petition for review be and is hereby denied and the cross-application for

enforcement of the order of the National Labor Relations Board is hereby granted and will be enforced.

Costs taxed against Consolidation Coal Company.

BY THE COURT,

/s/Max Rosenn

Attest:

/s/Sally Mrvos
Sally Mrvos, Clerk

Dated: Jan 21, 1993

SDO

307 NLRB No. 13

D--2713
Pittsburgh, PA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CONSOLIDATION COAL COMPANY

and

Case 6-CA-22722

UNITED MINE WORKERS OF AMERICA, INTERNATIONAL UNION AND UNITED MINE WORKERS OF AMERICA, DISTRICT 4 AND THEIR LOCAL UNIONS NO. 6321 AND 1980

DECISION AND ORDER

On September 11, 1991, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Union filed answering briefs.[1]

The National Labor Relations Board

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[1] The Respondent also filed a reply brief.

has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Consolidation Coal Company, Pittsburgh, Pennsylvania, its officers, agents,

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[2] In light of the type of violation alleged and found, i.e., a refusal to furnish information, we find it unnecessary to pass on the judge's determination at sec. III, par. 6 of his decision that the Respondent attempted to exclude certain operations from the terms of its collective bargaining agreement with the Union.

successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

"(b) In any like or related manner intefering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the following for paragraph 2(a).

"(a) Furnish the Union with the requested information as described in the Union's letter dated April 18, 1990."

3. Substitute the attached notice

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[3] The Respondent has excepted to the judge's finding that the Respondent must provide the information requested in the 48-page checklist, designated as C.P. Exh. 26, which was submitted by the Union following the hearing. At the hearing, the parties stipulated to a checklist procedure in order to determine what information had been provided by the (Footnote continued)

for that of the administrative law judge.

Dated, Washington, D.C. April 14, 1992

James M. Stephens, Chairman

Dennis M. Devaney, Member

Clifford R. Oviatt, Jr., Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

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[3](continued)
Respondent with respect to the original information request, a five-page letter dated April 18, 1990. The Respondent never stipulated however, to the relevance of the Charging Party's exhibit. Because the information requested in the April 18, 1990 letter has been found to be potentially relevant, and because the complaint dates the violation from the Respondent's failure to comply with the April 18 letter, we find that the remedy must be based on the April 18 letter, and not on the C.P. Exh. 26. Par. 2(a) of the recommended Order will be modified accordingly. If the parties have any dispute over any differences between the April letter and the C.P. Exh. 26, they

(Footnote continued)

[3](continued)
should first attempt to adjust their dispute through the process of collective bargaining. Compare Minnesota Mining & Mfg. Co., 261 NLRB 27, 32 (1982).

Also in par. 2(a) of his recommended Order, the judge provided a 20-day time period for the Respondent to respond to the Union's information request. We shall delete this requirement as unwarranted.

In par. 1(b) of his recommended Order, the judge used the broad cease-and-desist language "in any other manner." However, we have considered this case in light of the standards set forth in Hickmott Foods, 242 NLRB 1357 (1979), and have concluded that the narrow cease-and-desist language "in any like or related manner" is appropriate. We shall modify the judge's recommended Order accordingly.

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to bargain in good faith with the Union, United Mine Workers Of America, as the exclusive bargaining agent of our employees in the appropriate bargaining unit by failing and refusing to furnish the Union with certain requested information, which is necessary and relevant to the Union's performance of its function as the exclusive bargaining agent of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed to them in Section 7 of the National Labor Relations Act.

WE WILL furnish to the Union all information requested by the Union's letter dated April 18, 1990.

CONSOLIDATION COAL COMPANY
(Employer)

Dated _____ By _____
Representative Title

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or

compliance with its provisions may be directed to the Board's Office, 1000 Liberty Avenue, Room 1501, Pittsburgh, Pennsylvania 15222-4173, Telephone 412--644-2969.

JD--240--91
Pittsburgh, PA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CONSOLIDATION [sic] COAL COMPANY

and Case 6-CA-22722

UNITED MINE WORKERS OF AMERICA, INTERNATIONAL UNION AND UNITED MINE WORKERS OF AMERICA, DISTRICT 4 and their LOCAL UNIONS NO. 6321 and 1980

Suzanne C. McGinnis, Esq., of Pittsburgh, PA, for the General Counsel.
Michael Dinnerstein, Esq. and Judith A. Scott, Esq., of Washington, DC, for the Charging Party.
Daniel [sic] L. Fassio, Esq. and Anthony J. Polito, Esq. of Pittsburgh, PA, for the Respondent.

DECISION

Statement of the Case

RICHARD H. BEDDOW, JR., Administrative Law Judge: This matter was heard in Pittsburgh, Pennsylvania, on February 11 and 12, 1991, on a

consolidated record with Case No. 6-CA-22561. By order dated March 6, 1991, the proceedings were severed and subsequently briefs were filed by Respondent and the General Counsel. A Decision, JD-156-91, was issued in the related proceeding on June 7, 1991. This proceeding is based upon a charge filed May 21, 1990, by United Mine Workers of America, International Union and United Mine Workers of America, District 4 and their Local Unions No. 6321 and 1980. The Regional Director's complaint dated December 21, 1990,[1] alleges that Respondent, Consolidation [sic] Coal Company of Pittsburgh, Pennsylvania, violated Section 8(a)(1) and (5) of the National [sic] Labor Relations Act by

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[1] All following dates are in 1990 unless otherwise indicated.

failing and refusing to furnish the Union with certain information needed by the Union to police and enforce the parties' collective-bargaining agreement.

Upon review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. Jurisdiction

Respondent is engaged in the mining and non-retail sale of coal at facilities in Pennsylvania. It is wholly owned by DuPont Energy Co. and it admits that it and Consol Pennsylvania Coal Company and Enlow Fork and Mining Company are subsidiaries of the same parent company and have the same registered office address. It annually ships goods valued in excess of $50,000 from its locations in Pennsylvania to points outside that

State and it admits that all times material it has been an employer engaged in operation affecting commerce within the meaning of section 2(2), (6) and (7) of the Act. It also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

As noted in the related Decision in Case No. 6-CA-22561, Respondent is and has been a signatory to collective-bargaining agreements between the Bituminous Coal Operators Association ("BCOA") and the International Union. The National Bituminous Coal Workers Agreement, sometimes referred to herein as NBCWA, negotiated in 1988 is effective from February 1, 1988 to January 31, 1993. Mr. B.R. Brown, President of Respondent, was the chief negotiator for the employers' association.

The production of bituminous coal involves the depletion of resources at work locations, and because various mining arrangements can adversely impact on job security, the Union's main objective in the 1988 negotiations was to secure a provision that would offer protection to laid off miners. Consequently, for the first time, the agreement included a provision entitled "Article II, Job Opportunity and Benefit Security (JOBS)" wherein the Union's concerns about job security are expressly recognized.[2]

In effect, the contract provides

---

[2] The portions of Article II relevant to this proceeding are as follows:

> A. Non Signatory Operations
> 1. Except as modified in [sic] Section C, the first three out of every five new job openings for work of a nature covered by this agreement at any existing,
> (Footnote continued)

that employees laid off from Respondent's operations have the right to complete [sic] panel forms requesting re-employment to any job for which he or she is qualified at other mines of Respondent. The panel forms are then retained by Respondent and the Union. The contract also covers the operation of [sic] all coal lands and coal preparation facilities held by the signatory, its subsidiaries and affiliates, whether in operation at the time of the contract execution or at any time thereafter. The contract also bars the leasing or licensing of coal lands, coal production

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[2](continued)
new, or newly acquired [sic] non-signatory bituminous coal operation of the Employer shall be filled by classified laid off employees on the panels of the Employer's operations covered by this agreement. If the newly acquired or non-signatory
(Footnote continued)

or preparation facilities to avoid the application of the contract, and the licensing of coal lands if such licensing results in the loss of bargaining unit work.

Respondent admits that during negotiations for the NBCWA of 1988, President B. R. Brown agreed that Article II rights would extend to Respondent's Bailey Mine. District 4 President Ed Yankovich [sic] testified that at the contract explanation meetings on the NBCWA of 1988, the local union Presidents discussed rights and obligations under Article II. At that time, the local

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[2](continued)
operation has a panel of laid-off employees established pursuant to a valid collective bargaining agreement, those individuals shall first be recalled before this section applies.

C. Coordination of Employment
(Footnote continued)

union Presidents, including Yankovich who was then a local President, were informed about Brown's statements at the bargaining table and during the same time period, the Union also became aware of Respondent's plans to expand its Bailey operation, (referred to as Bailey No. 1) and create Bailey No. 2.

Respondent built Bailey No. 1 as a new mine in Greene County, Pennsylvania in 1984, naming it after a former executive, George Bailey. According to press accounts, the Bailey Mine operates on Respondent's reserves, however, Respondent Consol created a wholly owned

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[2](continued)

Obligations Under the JOBS Program

At those locations where the Employer hereto is the lesse-licensee of another employer which is also party to the obligations of Article II, the Employer hereto shall first

(Footnote continued)

subsidiary, Consol Pennsylvania Coal company ("CPCC"), in whose name the mine was operated. Bailey was treated like any other mine of Consol and Consol itself consistently referred to Bailey as one of its own mines in various documents and public statements. In late 1984, as Bailey No. 1 was almost ready to open, Consol began work on a so-called "companion mine" to Bailey, which Respondent initially referred to as Bailey No. 2. This title also used by the U.S. Department of Labor and the press. Bailey No. 2 was a physical continuation of the Bailey No. 1 Mine

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[2](continued)
honor the hiring obligation to which it should be bound as a result of the lessor-licensor's agreement with the Union. Thereafter, and at [sic] all other locations covered by this Article, the Employer hereto shall follow the obligations of
(Footnote continued)

with miners entering both mines through the same portal and coal from both mines existing on the same conveyor belt.

On March 14, 1990, Enlow Fork requested and thereafter was granted a transfer of the applicable mining permit from CPCC to the newly created "Enlow Fork Mining Company." After the 1988 agreement was signed, Consol stopped referring to the mine as Bailey No. 2 and started referring to it as the Enlow Fork Mine.

Prior to April 18, 1990, when the Union made its information request, a newspaper article in the Washington,

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[2](continued)
Section A and B above.

D. Employer-Wide Panel Rights to Signatory Operations
Each Employer also agrees to extend employer-wide panel rights to its signatory operations pursuant to Article XVII.

(Footnote continued)

Pennsylvania, Observer-Reporter disclosed that the companion operation of Bailey No. 1 would not be run by Respondent; but that "Enlow Fork [sic] Mining Company, a subsidiary of DuPont Energy Company" would be announcing the opening of the mine "informally referred to as Bailey 2 in the past." This specific revelation caused the Union to investigate whether the hiring was being conducted in accordance with Article II. On April 16, Yankovich wrote to B.R. Brown and requested information to show that the employees at the Bailey Mine were being hired in accordance with Article II. On May 4, Respondent informed the Union that

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[2](continued)
Accordingly, within forty-five (45) days of the effective date of the Agreement, a laid-off employee may revise his panel form for any purpose, in addition to his annual right of revision under Article XVII(d).

inasmuch as Bailey Mine is an operation of CPCC, not Respondent, neither the NBCWA of 1988 nor its Article II applied to the hiring at Bailey Mine.

By letter of April 18, the Union requested information from Respondent regarding each company in which Respondent plays a role or has an interest, including Consolidation Coal Company, CPCC, Enlow Fork and DuPont Energy Company and any other Subsidiary or affiliate of Respondent operating and/or controlling coal lands in Pennsylvania. The [sic] documents requested by the Union include, among others, leases, sub-leases, mining permits, and annual returns for employee benefit plans. The Union also inquired about the identity of the officers, directors and management representatives, customers and insurers of the Respondent

and its subsidiaries and/or affiliates as well as information regarding hiring procedures and transfer of personnel between the listed companies. The Union letter also set a date of compliance, May 6, after which it said a failure to respond would be considered a refusal.

On April 19, Local Union 6321 filed Grievance No. 90-17 against Respondent at its Robena Preparation Plant. This grievance alleged that Respondent, by and through CPCC, Enlow Fork, DuPont Energy Company and its other subsidiaries and affiliates, violated Article I, Ia, II and any other applicable sections by refusing to recognize panel rights of Union members. On April 20, Local Union 1980, filed an identically-worded grievance, Grievance No. 90-36, against Respondent at the Dilworth Mine. Both grievances were denied by the Supervisor

of Industrial and Employee Relations, Kathleen P. Kimbrough.

On May 7, District 4 President Yankovich telephoned Kimbrough to emphasize the Union's need for the information before processing the grievances to the Third Step of the grievance procedure. Kimbrough stated that she did not know whether Respondent would provide the requested information and refused to waive time limits on the grievances while Respondent decided on its course of action.

On May 10 and 14 respective Third Step grievance meetings were held and Yankovich pursued [sic] the information request. He stated that the information was necessary to determine whether Respondent violated Article II of the contract, however, Respondent refused to comply and took the position that the

Union must either arbitrate or drop the grievances without the benefit of the information. Respondent also refused a request to consolidate both Grievances for arbitration.

On June 8 the arbitration hearing for Grievance No. 90-17 was held. The arbitrator determined that Respondent was required to furnish the Union with the requested information and remanded the case back to the Third Step of the grievance procedure. He specifically noted that the question of whether the Act was violated was not before him, and stated that the fact that a charge alleging a violation of Section 8(a)(5) for failure to provide the information had been filed by the Union had no bearing on the arbitration case.

Respondent then filed a law suit in the United States District Court for the

Western District of Pennsylvania at Civil Action No. 90-1443, and moved to vacate, in part, the arbitrator's award. The Union filed a counterclaim seeking to enforce the arbitrator's award. These actions are pending in the Federal Court.

In June 1990, the Union filed a related suit at Civil Action No. 90-0969, to compel the joint participation of Respondent, CPCC and Enlow Fork in the processing of the two grievances discussed herein. Pursuant to discovery in this Action, the Union served Respondent, CPCC and Enlow Fork with Interrogatories and Requests for Production of Documents.

On September 9, Yankovich met with Respondent's Manager - Industrial Relations, Ronald Likar, for the purpose of viewing some of the documents described in the arbitrator's order,

however, the parties could not agree on a confidentiality agreement and the Union was not permitted to take possession of any of the documents. The defendants in the Federal Court Action filed Answers to Interrogatories in November. Thereafter, in response to the Requests for Production of Documents, certain documents were produced, however, the documents produced were subject to a confidentiality agreement whereby the Union was not permitted to use any of the material marked "CONFIDENTIAL" for any purpose other than the Federal Court Action.

At the hearing in the present case, on February 11, 1991, Respondent agreed that the Union could use the information and documents produced in the Federal Court Action for the performance of its duties as the exclusive

collective-bargaining representative of Respondent's employees covered by the NBCWA of 1988. During the course of the hearing the parties also agreed to a procedure whereby any and all of the requested information yet outstanding would be identified.

This was accomplished in a 48 page specific but summarized "check list" format filed by the Union on February 28, 1991, and it is hereby received into evidence as Charging Party Exhibit No. 26. On March 14, 1991, the Respondent filed a Response which is hereby identified as Respondents Exhibit No. 16 and received into evidence.

By pleading dated March 25, 1991 the Union filed a Reply. In turn, Respondent filed a Supplemental Response on April 11, 1991, to explain [sic] why it did not use the check-list format [sic] in an

attempt to narrow [sic] the issues.

Subsequently provided additional information was the subject of any agreement between the Respondent and Union on April 12, 1991, and it is hereby received into evidence as Charging Party Exhibits 16 through 25.[3]

Otherwise, the Respondent admits that some specific information and documents still have not been provided in response to the Union's June 18, 1990, letter, but it contends that such information is not necessary for or relevant to the performance of the Union's collective bargaining obligations

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[3]Charging Party Exhibit Nos.
16. One Single Document: 008458-008462
17. One single Document: 008465-008467
18. One Page Handwritten Note: 0084678
19. Second page of two page memo Prepared by Buck Hyler on January 9, 1990: 008469
20. First and fifth pages of five page Memo prepared by Greg Dixon on

(Footnote continued)

and the processing of the two pending grievances.

III. DISCUSSION

On Brief the Respondent agrees that the necessity and relevance of the information requested is normally a primary issue in a case of this nature. It contends, however, that the information sought here does not meet this test because the request is not premised on the processing and presentation of the underlying grievances, because these matters were taken from arbitration to the United States District Court on the Charging

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[3](continued)
December 26, 1989: 008470-008471
21. Two pages from Memo prepared by Greg Dixon on January 2, 1990: 008472-008473
22. One page Memo: 008475
23. One page Memo typed by "mm": 008479
24. One Single Document: 008480-008481
25. One page Memo: (missing sheet
(Footnote continued)

Party's own initiative, that the Federal Court now has jurisdiction of both the substantive and collateral discovery [sic] of documentation and information in the pending Federal Court proceeding and that the information thereby is no longer necessary and relevant to the presentation of the pending grievances.

The Respondent's contentions completely miss the thrust of this proceeding. This is a complaint by the Regional Director of the Board under the provisions of the National Labor Relations Act and it stands independent of any rights of the Charging Party to pursue other legal remedies. Respondent's plea could have some relevancy at the compliance stage in this

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[3](continued)
attachment): 008482

proceeding but it has no bearing at all on the question presented by the complaint which is directed at the issue of whether Respondent violated the Act in the spring of 1990 when it failed and refused to comply with the Union information request.

As summarized in the related proceeding decided June 7, 1991, it is well established that as part of its duty to bargain in good faith, an employer must comply with a union's request for information that will assist the union in fulfilling its responsibilities as the employees' statutory representative NLRB v. Acme Industrial Company, 385 U.S. 432 (1967); Detroit Edison v. NLRB, 440 U.S. 301, 303 (1979), including information relevant to both contract administration and contract negotiation, Leland Stanford Jr. University, 262 NLRB 136, 139 (1982),

enfd. 715 F.2d 473 (9th Cir. 1984).

The standard applied in determining relevancy in these circumstances requires that the information have some bearing on the issue for which the information is requested and be of probable or potential relevance to the Union's duties. Pfizer, Inc., 269 NLRB 916, 918 (1984).

The instant proceeding has nothing to do with the substantive and ultimate merits of the grievances but deals only with Respondent's admitted failure at the time of the information request and it's [sic] admitted subsequent failure, up to and including this time it filed its brief, to fully comply.

The issue in this proceeding is tied into the Union's need for information regarding Respondent's apparent relationship to operations which would tend to provide employment opportunities

within the frame work of the Union's collective bargaining agreement with the Respondent, operations which Respondent or its parent or affiliated companies have attempted to exclude from the terms of the agreement.

Respondent failed to comply in a timely manner to the initial information request and I find that it's subsequent piecemeal disclosure of dribs and drabs of information at each successive stage of the Union's efforts; including the grievance and arbitration procedures, the Federal Court Procedure [sic], and the initial stages of this Administrative Court proceeding, does nothing to mitigate or satisfy its primary and pre-existing [sic] duties to bargain in good faith. Respondent did not meet its obligation in a timely manner, See EPE, Inc. 284 NLRB 191 (1987), and,

accordingly, the Respondent must be found to be in violation of the Act unless it shows that the Union and General Counsel have failed to show the necessity and relevancy to the Union collective bargaining function of the information requested by the Union and also has failed to establish even a "reasonable belief" that Respondent and Enlow Fork were operating as a single employer.

As stated in Bohemia, Inc., 272 NLRB 1128 (1984), a union must generally establish the relevancy of information regarding an employer's potential single employer or alter ego relationship with another entity. This burden was applied in Maben Energy Corp., 285 NLRB No. 23 (1989), a case similar to the instant case, inasmuch as it involved an information request by the United Mine Workers pursuant to Article II of the

1988 agreement. There, the Board found that where a union seeks information to establish an alter ego or single employer relationship, it is not required to prove the existence of such a relationship, rather, it is sufficient "that General Counsel has established that the union has an objective factual basis for believing" that one entity is an "alter ego or single employer" of the other.

Here, I am persuaded that the Union is shown to have had a clear objective basis for its request for information. In Maben Energy, supra, the Board found that the Union's showing amply demonstrated probable and potential relevance of the requested information in fulfilling its statutory [sic] representative duties. The union, as here, requested specified information from respondent employer in order "to

effectively administer and monitor important contractual rights and obligations"; "to determine the extent if any of the interrelationship between signatory companies and non-signatory companies for the purposes of contract administration and bargaining"; "to determine whether the listed employers constitute a joint employer or single employer or alter ego"; and because the information could impact on the important contractual rights including seniority, panel and recall, and job security bidding rights.

Here, in order to pursue [sic] its grievances filed under Article I, Ia and II of the contract, the Union sought information to establish that Respondent, CPCC, Enlow Fork and any other subsidiary or affiliate operate as a joint or single employer with Respondent. The Union's

objective belief that Respondent, by and through various other entities, is seeking to avoid its contractual obligations was based upon numerous bits of information, much of it information generated by Respondent itself as well as information that was part of the public record or information which appeared in other publicized accounts.

Despite the fact that in 1988 Respondent's president had specifically recognized that the Article II JOBS provisions were applicable to the Bailey Mine, on May 4, 1990, the Union was informed that the Bailey Mine was not an operation of Respondent but solely an operation of CPCC. Because of various newspaper articles, inter-company newsletters and other documents, however, the Union understood that it was part of the Respondent's operations. For

example, Bailey Mine is listed as part of Respondent's Eastern Region Washington Operations in several publications of Respondent's newspaper and on interoffice memoranda regarding the terms and conditions of employment of the employees at Bailey Mine. In one issue of Consol News, B.R. Brown, in a message from the Chairman, enumerated the achievements of Respondent's marketing department in cultivating customers for the coal from Bailey Mine and in a corporate profile of Respondent in the October 1988 issue of Coal, Respondent is credited with building the largest underground coal mine (Bailey) in the Western Hemisphere. Newspaper articles monitored by the Union consistently referred to "Consolidation Coal Company's Bailey Mine" and the Mine was named for Respondent's former President, Ralph Bailey.

The Union also became aware of several instances of interchange among supervisors at Respondent's Dilworth Mine and supervisors at Bailey Mine. Until late 1989 Respondent's plans to expand the Bailey were self described with references [sic] to the additional mine under construction as Bailey No. 2. Also, U.S. Department of Labor Mine Safety and Health Administration reports also referred to Consol Bailey No. 2 Mine and described occurrences on Slope No. 2.

A further basis for the Union's belief in an apparent relationship between Respondent, CPCC and Enlow Fork is the physical outlay of the Bailey Mine and the Enlow Fork Mine. Both mines are entered via a common entrance. Coal exits the mine via the same slope and is dumped on a common belt. Moreover, these entities [sic] were known to jointly sell

the coal produced by the mines and it appeared the Respondent and CPCC have jointly agreed to sell coal from Bailey Mine. In addition, Enlow Fork has contractual relationships with Respondent and CPCC whereby these companies, which have the "necessary experience and personnel" will perform services for Enlow Fork. The Union is aware that Respondent, CPCC and Enlow Fork all receive mail at the same address.

Under these circumstances, I conclude that the General Counsel has shown that the Union had a reasonable basis for the potential relevance for the requested information concerning the single, joint employer or alter ego relationships and that the information is relevant to a determination of whether Respondent violated the contract. As discussed above, the Respondent otherwise

is shown to have failed at all times to fully satisfy its obligation to bargain in good faith by timely satisfaction of the Union's information requests and, accordingly, I conclude that the Respondent is shown to have violated Section 8(a)(1) and (5) of the Act as alleged.

Finally, I also conclude that the Respondent has persisted both on brief and in its uncooperative response to the procedures [sic] proposed and followed by the Union by means of Charging Party's Exhibit No. 26 for identification of outstanding information not otherwise yet disclosed, to needlessly burden the whole process with repeated and unfounded "relevance" [sic] contentions.

There is no need for this Administrative Court to assume the burden of examining what purports to be over

seven thousand pages of documentation. Here, the Charging Party has the right to review the broad category [sic] of information requested so that it may select what it believes to be relevant and necessary for presentation in any follow-up procedures related to the noted grievance proceedings. Questions regarding the actual relevance of information sought to be relied upon can be justified at that point and I see little danger of any attempt by the Union to needlessly burden any record by the attempted introduction of irrelevant material.

Respondent's continued self-serving insistance that it "does not believe" material is required or relevant has gone beyond the pale of legitimate [sic] argument. As enumerated by the Charging Party the Respondent admits the existence

of specific documents relevant to the Union's request which it has not provided the Union in its response Exhibit No. 16 regarding a mining contract; employee benefit plan; names and addresses [sic] of common owners, supervisors, managers, and industrial relations personnel; and names and addresses of entities. It also has admitted that some disclosed reports coal sales agreements are only representative samples.

Inasmuch as the Respondent has created the overall situation in which it now finds itself, it cannot be heard to complain that it has some further rights that entitle it to be less than fully forthcoming in its disclosures to the Union. Accordingly, the "Remedy" Section of this Decision will provide for the prompt disclosure of all of the requested information specifically listed by the

Charging Party as well as the imposition of a "broad" remedial Order.

IV. Conclusions of Law

1. Respondent is an Employer engaged in commerce as alleged.

2. The Union is a labor organization as alleged.

3. The Respondent has failed and refused to bargain in good faith with the Union by failing and refusing to furnish the Union with certain requested information, as described in the above Decision, which was and is necessary and relevant to the Union's performance of its function as the exclusive bargaining agent of the unit employees in violation of Section 8(a)(1) and (5) of the Act.

V. The Remedy

Having found that Respondent has engaged in unfair labor practices, it is recommended that the Respondent be

ordered to cease and desist therefrom and to take the affirmative action described below which is designed to effectuate the policies of the Act.

With respect to the necessary affirmative action, it is recommended that Respondent be ordered to cease and desist from engaging in such conduct or in any other manner interfering with employee rights and to turn over to the Union all of the requested information described above and as specifically enumerated in Charging Party's Exhibit No. 26 and to post the attached notice.

In this proceeding, it is considered necessary that a broad Order be issued. This conclusion is reached because of the Respondent's persistance in refusing and avoiding any reasonable or timely good faith effort to satisfy an information request that has been clearly established

to be valid under current and applicable Board law. Any matters of purported confidentiality can be considered and accommodated, if necessary, at the compliance stage of the proceeding.

Upon the foregoing findings of fact and conclusions of Law, upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:[4]

ORDER

Respondent, Consolidation [sic] Coal Company, its officers, agents, successors, and assigns shall:

1. Cease [sic] and desist from:

(a) Failing [sic] and refusing

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[4] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

to bargain in good faith with the Union, UNITED MINE WORKERS OF AMERICA, by failing and refusing to furnish the union with certain requested information, as described in the above Decision, which was and is necessary and relevant to the Union's performance of its function as the exclusive bargaining agreement agent of unit employees.

(b) In any other manner, interfering with, restraining or coercing their employees in the exercise of the rights guaranteed to them in Section 7 of the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish the Union within 20 days with all the requested information as described in the above Decision.

(b) Post at its facilities in Pennsylvania copies of the attached notice marked "appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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[5] If this Order is enforced by a Judgement of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR."

(c) Notify the Regional Director for Region 6 in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. September 11, 1991

/s/Richard H. Beddow, Jr.
Richard H. Beddow, Jr.
Administrative Law Judge